Court File No: T-1348-12

FEDERAL COURT

BETWEEN:

CONRAD BLACK

Applicant

- and -

THE ADVISORY COUNCIL FOR THE ORDER OF CANADA

Respondent

RESPONDENT'S MEMORANDUM OF FACT AND LAW

August 13, 2012

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PART I – OVERVIEW AND STATEMENT OF FACTS

A. OVERVIEW

1. The Applicant, Conrad Black provides no legal basis for this Honourable Court to make the extraordinary interlocutory order that he requests. There is no regulation or statutory instrument requiring the Advisory Council of the Order of Canada to follow a stipulated procedure before making a recommendation to the Governor General on his exercise of the prerogative power over the granting and withholding of honours. That recommendation process, like the Governor General's royal prerogative, is not amenable to judicial review. In any event, the Policy for making recommendations to the Governor General does not provide for an oral hearing. Therefore, there is no legitimate expectation that one will be provided.

2. The application is also premature. Judicial review of interlocutory procedural rulings is exceptional. While the procedural objection raised by the Applicant is so lacking in merit that it can be dismissed on that basis alone, it is also clear that this challenge to the Advisory Council's decision to deny an oral hearing does not warrant

this Court's early intervention. Even if the Advisory Council's procedural decisions are subject to review by the courts, the Applicant has an alternative remedy as he may challenge any alleged procedural defect in the process if and when his appointment is terminated by the Govemor General of Canada.

B. STATEMENT OF FACTS

1) The Order of Canada

3. The Order of Canada was created by Letters Patent issued by the Queen in 1967.[1] The Order of Canada, like the Order of Merit, the Order of Military Merit and the Order of Merit of the Police Forces, is part of the Canadian Honours system and is awarded pursuant to the Crown prerogative over honours.[2]

4. The *Constitution of the Order of Canada* ("*Constitution*"), a Schedule to the Letters Patent, empowers the Governor General of Canada ("Governor General") to appoint individuals to the Order of Canada in recognition of the highest levels of achievement and service to humanity at large, to Canada or to their community, group or field of activity.[3]

5. The Order of Canada consists of Her Majesty in right of Canada, the Governor General of Canada, the Governor General's spouse and the Companions, Officers and Members and the honorary Companions, Officers and Members.[4]

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[1] *Letters Patent, 1967*, Book of Authorities of the Respondent ("Respondent's Authorities), tab 1
[2] P. Lorden, *Crown Law*, 1991(Butterworths), p. 103, Respondent's Authorities, tab 24
[3] *Constitution of the Order of Canada, Letters Patent,* 2001 ("*Constitution*"), ss. 9, 11, 16, 18. The *Constitution* has been amended several times since the Letters Patent were issued in 1967. The most recent version was published in 2001, Respondent's Authorities, tab 2
[4] *Constitution, supra*, s. 2, Respondent's Authorities, tab 2

6. There are three ranks of membership in the Order: Companions, Officers, and Members. The Governor General may appoint an individual to any level of membership and, once appointed to the Order, the Governor General may elevate any membership with the individual's consent.[5]

7. The privileges accorded to Companions, Officers and Members are symbolic. Once appointed, Companions, Officers and Members are entitled to wear insignia as prescribed by the Governor General, petition the Chief Herald of Canada to grant lawful armorial bearings, surround their shield of arms with the circle and motto of the Order and suspend therefrom the ribbon and badge of their rank, and place after their name initials signifying their rank as Companion (C.C.), Officer (O.C.) or Member (C.M.).[6]

2) **Appointments to the Order**

8. Any Canadian citizen may be appointed as a Companion, an Officer or a Member of the Order. A person who is not a Canadian citizen may be appointed as an honorary Companion, Officer or Member.[7]

9. The total number of appointments at the rank of Companion of the Order is limited, as is the maximum number of appointments which may be made at the rank of Officer and Member in a given year.[8]

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[5] *Constitution, supra*, ss. 1, 24, Respondent's Authorities, tab 2
[6] *Constitution, supra*, s. 21(1), Respondent's Authorities, tab 2
[7] *Constitution, supra*, s. 9(1) and (2), Respondent's Authorities, tab 2
[8] *Constitution, supra*, ss. 13-15, 17, 19, Respondent's Authorities, tab 2

10. Before making an appointment to the Order of Canada, the Governor General obtains the advice of the Advisory Council for the Order of Canada ("Council"). The Council is established pursuant to section 7 of the *Constitution*. The Council consists of the Chief Justice of Canada, the Clerk of the Privy Council, the Deputy Minister of the Department of Canadian Heritage, the Chairperson of the Canada Council, the President of the Royal Society of Canada, the Chairperson of the Board of Directors of the Association of Universities and Colleges of Canada, and up to five additional members appointed by the Governor General.[9]

11. Pursuant to section 8 of the *Constitution,* the Council's role is to:

(a) consider those nominations referred to in paragraph 5(c) that the Secretary General of the Order has transmitted to it;

(b) compile and submit to the Governor General a list of those nominees in the categories of Companion, Officer and Member and honorary Companion, Officer and Member who have the greatest merit; and

(c) advise the Governor General on such matters as the Governor General may refer to Council.[10]

12. Appointments to the Order are made by instrument signed by the Governor General and sealed with the Seal of the Order.[11]

3) Termination of an appointment to the Order of Canada

13. The *Constitution* provides that a person's appointment to the Order terminates upon death, acceptance of a person's resignation from the Order in writing, or upon the

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[9] *Constitution, supra*, ss. 7(1)-(3). The Council shall invite the Deputy Minister of the Department of Foreign Affairs and International Trade to participate in the review of nominations for honorary Companions, Officers and Members; s. 7(4). Respondent's Authorities, tab 2

[10] *Constitution, supra*, s. 8, Respondent's Authorities, tab 2

[11] *Constitution, supra*, s. 20(1), Respondent's Authorities, tab 2

Governor General making an Ordinance terminating the person's appointment.[12] Section 26 of the *Constitution* authorizes such Ordinances as follows:

> 26. The Governor General may make Ordinances respecting the government and insignia of the Order and the termination of a person's appointment to the Order.[13]

14. In practice, the Governor General seeks the advice of the Council in all cases where termination of an appointment is considered. Pursuant to the "Policy and Procedure for Termination of Appointment to the Order of Canada" ("Policy"), the Council makes recommendations to the Governor General in respect of the termination of a person's appointment to the Order of Canada.[14]

15. Pursuant to the Policy, the Council *shall* consider termination of a person's appointment to the Order of Canada if the person has been convicted of a criminal offence; has been sanctioned by an adjudicating body, professional association or organization; or, if the person's conduct sufficiently departs from generally recognized standards that it "is seen to undermine the credibility, integrity, or relevance of the Order...".[15]

16. The Policy also provides that the recommendation by the Council concerning termination of a person's appointment to the Order of Canada must be made fairly, based on evidence and after the Council has ascertained the relevant facts.[16]

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[12] *Constitution, supra*, s. 25, Respondent's Authorities, tab 2
[13] *Constitution, supra*, s. 26, Respondent's Authorities, tab 2
[14] Policy and Procedure for Termination of Appointment to the Order of Canada ("Policy"), s. 3, Affidavit of Conrad Black, sworn July 17, 2012 ("Black Affidavit"), Exhibit 2, Application Record, tab B2
[15] Policy, *supra,* Black Affidavit, *supra,* Exhibit 2, s. 3, Application Record, tab B2
[16] Policy, *supra*, Black Affidavit, *supra*, Exhibit 2, s. 2, Application Record, tab B2

17. The Policy outlines an eleven stage process whereby the Council notifies an individual in writing if it is considering recommending the termination of that individual's Order of Canada and provides the individual the opportunity to "make representations in writing, or as the Secretary General may authorize."[17] At the conclusion of this process, the Council prepares for the Governor General a report that contains its findings and recommendations.[18]

18. Upon receipt of the report, the Governor General enjoys unfettered discretion to determine the issue, and may request the Secretary General to either advise the person in question that he or she remains in the Order in good standing, or may make an Ordinance terminating the person's appointment to the Order.[19]

19. Upon termination of an appointment, an announcement is made in the Canada Gazette and a press release is issued by the Governor General's office.[20]

4) <u>The facts underlying this application</u>

20. The Applicant, Conrad Black was appointed as an Officer of the Order of Canada in 1990.[21]

21. On July 20, 2011, Stephen Wallace, Secretary to the Governor General, wrote to Mr. Black to advise him that the Council had determined that there may be reasonable grounds for the termination of his appointment to the Order. Mr. Black was

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[17] Policy, *supra*, Black Affidavit, *supra,* Exhibit 2, s. 5, stage 7, Application Record, tab B2
[18] Policy, *supra,* Black Affidavit, *supra,* Exhibit 2, s. 5, stage 9, Application Record, tab B2
[19] Policy, *supra*, Black Affidavit, *supra,* Exhibit 2, s. 5, Application Record, tab B2
[20] Black Affidavit, *supra,* Exhibit 4, Application Record, tab B4, p. 33
[21] Black Affidavit, *supra,* para. 3, Application Record, tab B, p. 6-7

asked to notify the Secretary General if he wished to resign voluntarily, or if he chose to make representations to do so in writing before August 17, 2011.[22]

22. In response, on August 17, 2011 Mr. Black wrote to the Secretary General. The letter included representations as to why his appointment should not be terminated as well as a request for an oral hearing before the Advisory Council prior to its formulation of a recommendation. In the conclusion to his letter, Mr. Black indicated that if an oral hearing were not granted, he would "be obliged to consider the recourses available to me which would include, but not be limited to, a review of that decision and/or supplementing this submission."[23]

23. By letter dated June 7, 2012, the Secretary General wrote to Mr. Black to advise that the Council would not hold an oral hearing. The letter indicated that, in considering the termination of his appointment, the Advisory Council would have regard to five reported United States decisions in relation to Mr. Black's United States convictions. The letter invited Mr. Black to make additional representations in writing, supported by any documentation upon which Mr. Black wished to rely, provided they were provided by July 7, 2012. The letter also advised that following receipt of these submissions, the Council would review Mr. Black's appointment and make a recommendation to the Governor General.[24]

24. On June 26, 2012, counsel for Mr. Black wrote to the Secretary General to request reconsideration of the decision not to hold an oral hearing. The letter advised

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[22] Black Affidavit, *supra,* Exhibit 1, Application Record, tab B1, p. 17
[23] Black Affidavit, *supra,* Exhibit 3, Application Record, tab B3, p. 31
[24] Black Affidavit, *supra,* Exhibit 4, Application Record, tab B4, p. 33-34

that in the absence of the Council's agreement with Mr. Black's position, counsel had been instructed to seek judicial review. A response was requested within seven days.[25]

25. The Secretary General responded on July 6, 2012, and again advised that the Council would not hold an oral hearing, but that as previously indicated the Council was prepared to consider additional written representations. In light of the passage of time, Mr. Black was invited to make those representations no later than July 23, 2012.[26]

26. By Notice of Application issued July 9, 2012, Mr. Black asks this Court to review the Council's interlocutory decision denying him an oral hearing prior to completing its review and making a recommendation to the Governor General as to the possible termination of his appointment to the Order of Canada.[27]

27. On July 19, 2012, following the filing of the Applicant's motion for an injunction, and the Respondent's motion to strike, Madame Justice Tremblay-Lamer issued an Order which provided that the application be expedited and set down for hearing on August 24, 2012.[28]

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[25] Black Affidavit, *supra,* Exhibit 5, Application Record, tab B5, p. 36-37
[26] Black Affidavit, *supra,* Exhibit 6, Application Record, tab B6, p. 39-40
[27] Notice of Application, July 9, 2012, Application Record, tab A, p. 3
[28] Order of Tremblay-Lamer J., dated July 19, 2012, Respondent's Record, tab 1

PART II – POINTS IN ISSUE

28. The issues raised by this Application are:

(a) whether the exercise of the honours prerogative, including the process by which a recommendation is made to the Governor General is susceptible to judicial review;

(b) if the honours procedure is reviewable, whether the Applicant is entitled to an oral hearing; and

(c) whether the application is premature.

PART III – SUBMISSIONS

A. THE HONOURS PREROGATIVE IS NOT JUSTICIABLE

29. The granting and revocation of honours is an exercise of royal or Crown prerogative and is one of the few classes of the prerogative which is not subject to judicial review under section 18.1 of the *Federal Courts Act*. At its highest, review may be available with respect to an allegation that there is a legitimate expectation to a process required by regulation.[29]

1) Crown prerogative over the grant of honours

30. Professor Hogg explains that "the royal prerogative consists of the powers and privileges accorded by the common law to the Crown."[30] The sovereign is the ""fountain of honour" and may grant honours or awards based on the prerogative."[31] The Letters Patent constituting the Order of Canada is the instrument through which the

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[29] *Chiasson v. Canada*, [2003] F.C.J. No. 477, 2003 FCA 155 ("*Chiasson*"), paras. 7-11, Applicant's Book of Authorities ("Applicant's Authorities"), tab 8

[30] P. Hogg, Constitutional Law of Canada, looseleaf, p. 1-18, Respondent's Authorities, tab 25. See also: *Schreiber v. Canada (Attorney General)*, [2000] 1 F.C. 427 (T.D.), para. 27, Respondent's Authorities, tab 3

[31] Hogg & Monahan, *Liability of the Crown*, 3rd Edition, pp. 15-16, Respondent's Authorities, tab 26

Queen has delegated her prerogative powers with respect to the Order of Canada.[32] These powers are exercised by the Governor General, who is the Chancellor and Principal Companion of the Order. [33]

2) <u>Courts have expressly declined to review the exercise of the honours prerogative</u>

31. Although courts have accepted that the mere fact that a matter involves the prerogative will not insulate it from review, the honours prerogative is by its nature one of the few remaining powers which are not susceptible to judicial review.[34] This is because the assessment of merit is a highly subjective matter that does not engage individual legal rights and is not amenable to judicial analysis.

32. As the Federal Court of Appeal held in *Chiasson*, a question is "normally considered non-justiciable if there are no objective legal criteria to apply or no facts to be determined to decide the question".[35] In addition, it will be non-justiciable "where some other branch of government is conspicuously more appropriate, in our constitutional system, to decide the matter."[36]

33. The proposition that the conferral or withholding of honours is not justiciable finds strong support in the decisions of the House of Lords in *Council of Civil Service*

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[32] Lorden, *supra*, p. 103, Respondent's Authorities, tab 24
[33] *Constitution, supra*, ss. 3,4, Respondent's Authorities, tab 2
[34] Evatt, *The Royal Prerogative*, 1987, C25-C34, Respondent's Authorities, tab 27
[35] *Chiasson, supra*, para. 8, Applicant's Authorities, tab 8
[36] *Chiasson, supra*, para. 8, Applicant's Authorities, tab 8

Unions v. Minister for the Civil Service[37] and of the Ontario Court of Appeal in *Black v. Chretien*[38].

34. At issue in the former case was whether the executive, in the exercise of the prerogative, could bar employees of the national security establishment from joining trade unions. Lord Roskill found that there was no "logical reason why the fact that the source of the power is the prerogative and not statute should today deprive the citizen of that right to challenge the manner of its exercise which he would possess were the source of the power statutory". However, Lord Roskill also held that the right of challenge to the prerogative is not unqualified:

> Prerogative powers, such as those relating to the making of treaties, the defence of the realm, the prerogative of mercy, the grant of honours, the dissolution of Parliament and the appointment of ministers as well as others are not, I think, susceptible to judicial review because their nature and subject matter are not such as to be amenable to the judicial process. The courts are not the place wherein to determine whether a treaty should be concluded or the armed forces disposed in a particular manner or Parliament dissolved on one date rather than another.[39] [emphasis added]

35. In *Black v. Chretien*, the Ontario Court of Appeal agreed with Lord Diplock's analysis in the *Council of Civil Service Unions* case, that where the exercise of a prerogative power may affect the rights of an individual, it may be subject to review by the Courts.[40] Laskin J.A. further adopted Lord Roskill's view that the honours

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[37] *Council of Civil Service Unions v. Minister for the Civil Service*, [1985] 1 A.C. 374 ("*Council of Civil Service Unions*"), Respondent's Authorities, tab 4
[38] *Black v. Conoda*, [2001] O.J. No. 1853 ("*Black*"), Applicant's Authorities, tab 9
[39] *Council of Civil Service Unions, supra*, p. 418, Respondent's Authorities, tab 4
[40] *Black, supra*, paras. 47-49, Applicant's Authorities, tab 9; *Council of Civil Service Unions, supra*, p. 418, Respondent's Authorities, tab 4. See also: *Copello v. Canada (Minister of Foreign Affairs)*, 2001 FCT 1350, paras. 60-72, affirmed 2003 FCA 295, paras. 16-22, Respondent's Authorities, tab 5

prerogative was not justiciable, and held that because no individual is entitled to an honour, no procedural rights are engaged:

> The refusal to grant an honour is far removed from the refusal to grant a passport or a pardon, where important individual interests are at stake. Unlike the refusal of a peerage, the refusal of a passport or a pardon has real adverse consequences for the person affected. Here, no important individual interests are at stake. Mr. Black's rights were not affected, however broadly "rights" are construed. No Canadian citizen has a right to an honour.
>
> And no Canadian citizen can have a legitimate expectation of receiving an honour. In Canada the doctrine of legitimate expectations informs the duty of procedural fairness; it gives no substantive rights. *Baker v. Canada (Minister of Citizenship and Immigration)* (1999), 174 D.L.R. (4th) 193 at 212-14 (S.C.C.). See also *Civil Service Unions*, per Lord Diplock at p. 408-9. Here Mr. Black does not assert that he was denied procedural fairness. Indeed, he had no procedural rights.
>
> But even if the doctrine of legitimate expectations could give substantive rights, neither Mr. Black nor any other Canadian citizen can claim a legitimate expectation of receiving an honour. The receipt of an honour lies entirely within the discretion of the conferring body. The conferral of the honour at issue in this case, a British peerage, is a discretionary favour bestowed by the Queen. It engages no liberty, no property, no economic interests. It enjoys no procedural protection. It does not have a sufficient legal component to warrant the court's intervention. Instead, it involves "moral and political considerations which it is not within the province of the courts to assess". See *Operation Dismantle, supra*, per Dickson J. at p. 465.[41] [emphasis added]

36. Since the Ontario Court of Appeal decision in *Black v. Canada*, there have been two cases in the Federal Court where the court concluded that a *legislated* procedure in relation to honours *may* be justiciable. Both cases were interlocutory decisions on motions to strike in which the "plain and obvious" standard was applied. In this case, there is no legislated procedure that might fetter the royal prerogative.

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[41] *Black, supra*, paras. 59-62, Laskin J.A. expressly concluded that holding that the honours prerogative is always beyond the review of the courts is faithful to the subject matter test espoused by the House of Lords (para. 59), Applicant's Authorities, tab 9

37. In *Chiasson v. Canada*, the Federal Court of Appeal affirmed the general principles outlined by the Ontario Court of Appeal as to the justiciability of the honours prerogative, but was not prepared to rule out the *possibility* that the procedure for the granting of honours *may* be subject to a very limited review on the basis of legitimate expectations, in circumstances where a legislated procedure has been outlined to ensure compliance.[42] In refusing to strike the application which sought review of a decision of the Canadian Decorations Advisory Committee, Justice Strayer said:

> I respectfully agree with Laskin J.A. writing for the Ontario Court of Appeal in the Black case (paragraphs 60-63) that no one has a right to an honour, nor can he or she have a legitimate expectation, in a substantive sense, of receiving an honour. However, it is in my view arguable that where a procedure has been established by one public authority, in this case by way of Regulations published in the Canada Gazette, as to how and on what basis a specific Committee, another public body, is to deal with nominations made by any citizen, then a legitimate expectation is thereby created that the prescribed procedure will be followed to screen such nominations prior to the submission of a list of nominees for the exercise by the Governor General of the royal prerogative.[43] [emphasis added]

38. The *Chiasson* application does not appear to have been determined on its merits. Similarly, in *Chauvin v. Canada*, relied on by the applicant, the applicant alleged that the Advisory Council failed to comply with the *Constitution* in considering the appointment of Dr. Morgentaler to the Order. Prothonotary Aalto refused to strike the claim on the basis of non-justiciability as he believed the court may be entitled to review the decision against the "clear criteria" in sections 8, 9 and 18 of the *Constitution*. The claim was struck on other grounds and was never decided on the merits.

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[42] *Chiasson, supra*, paras. 7-11, Applicant's Authorities, tab 8
[43] *Chiasson, supra*, para. 9, Applicant's Authorities, tab 8

39. The *Constitution* is a statutory instrument within the meaning of the *Statutory Instruments Act*.[44] The *Constitution* does not prescribe any process for the termination of an honour or for recommendations to be made to the Governor General.

40. In the absence of a procedure prescribed by statutory instrument, the process chosen by the Advisory Council in making its recommendation to the Governor General concerning the potential termination of an should not be justiciable, just as the Governor General's decision itself is not justiciable. All decisions relating to this non-justiciable subject matter are conspicuously more appropriate to be determined by the Governor General on the advice of his Advisory Council.

3) <u>There is no legitimate expectation to an oral hearing</u>

41. Further, to the extent that *Chiasson* and *Chauvin* suggest that judicial review *may* be appropriate where a statutory instrument creates a legitimate expectation to a prescribed procedure, in the specific context of this case, there can be no legitimate expectation that an oral hearing will be held. Legitimate expectations only give rise to procedural rights where a "clear, unambiguous, and unqualified" representation is made.[45]

42. Far from providing a right to an oral hearing, the Policy provides for only written submissions, unless the Secretary General determines otherwise. The only expectation that could be argued from the Policy is that an individual could make

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[44] *Statutory Instruments Act*, R.S.C. 1985, c. S-22, section 2
[45] *Mavi v. Canada (Attorney General)*, [2011] 2 S.C.R. 504, ("*Mavi*") para. 68, Respondent's Authorities, tab 5

written representations. The Policy's suggestion of the possibility of an exception to written submissions cannot give rise to a legitimate expectation of an oral hearing.

B. NO BREACH OF PROCEDURAL FAIRNESS

43. To the extent that decisions in relation to the exercise of a prerogative power may be justiciable to determine whether a prescribed procedure is followed, there can be no greater entitlement to procedural fairness beyond any legitimate expectation to the prescribed procedure.[46] However, even putting aside the issue of non-justiciability and the absence of any basis to argue legitimate expectations, Mr. Black's assertion that procedural fairness requires an oral hearing in this case cannot succeed according to settled principles of administrative law.

1) The scope of procedural fairness depends on the context of each case

44. When all of the factors identified by the Supreme Court in the *Baker* decision are applied to the facts of this case, it is clear that the content of a legal duty to procedural fairness does not include an oral hearing.

45. In *Baker*, the Supreme Court of Canada held that the content of procedural fairness will depend on the context of each case. The factors that are to be considered in making this determination include: the nature of the decision and the decision making-process; the nature of the scheme in which the decision maker operates; the importance of the decision to the individuals affected; the legitimate expectations of the

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[46] *Chiasson, supra*, para. 16, Applicant's Authorities, tab 8. See: *Copello, supra*, (FCTD) paras. 80-81; (FCA) para. 18, Respondent's Authorities, tab 5

party challenging the decision; and the nature of the deference to be accorded to the decision making body.[47]

2) **No right to an oral hearing in this case**

46. The Court in *Baker* clearly indicated that an oral hearing is not necessary in every circumstance:

> ...the purpose of the participatory rights contained within the duty of procedural fairness is to ensure that administrative decisions are made using a fair and open procedure, appropriate to the decision being made and its statutory, institutional, and social context, with an opportunity for those affected by the decision to put forward their views and evidence fully and have them considered by the decision-maker.[...]
>
> ...it also cannot be said that an oral hearing is always necessary to ensure a fair hearing and consideration of the issues involved. The flexible nature of the duty of fairness recognizes that meaningful participation can occur in different ways in different situations.[48]

47. When the *Baker* factors are applied to this case, the procedural fairness owed to the applicant is minimal and does not include an oral hearing.

i) Nature of the Decision

48. As an exercise of Crown prerogative, the nature of the ultimate decision is purely discretionary.[49] The Advisory Council is not exercising a judicial or quasi-judicial function.[50] The role of the Council is limited to conducting a review of the facts and providing its recommendation to the Governor General to assist him in the exercise of his prerogative. The decision engages no legal rights or entitlements.

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[47] *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 ("*Baker*"), paras. 22-27, Applicant's Authorities, tab 13

[48] *Baker, supra*, paras. 22, 33, Applicant's Authorities, tab 13

[49] *Chauvin v. Canada*, [2009] F.C.J. No. 1496 (F.C.) ("*Chauvin*"), Applicant's Authorities, tab 7

[50] See: *Baker, supra*, para. 23, where the court indicates greater procedural protections may be warranted where the decision resembles judicial decision making, Applicant's Authorities, tab 13

ii) Nature of the Statutory Scheme

49. Unlike *Chiasson*, there is no regulation or statutory instrument outlining the procedure for the granting or termination of honours. The *Constitution* simply provides that the Governor General may terminate an honour by ordinance. The absence of a statutory scheme or instrument in this case supports a high standard of deference, as Her Majesty the Queen did not choose to mandate a process for the Governor General's exercise of the Crown prerogative. This process was left to the broad discretion of the Governor General and his advisors.

iii) Importance of the Decision

50. The interests affected by the decision do not engage any legal rights. There is no right or legitimate expectation to an honour, nor is there any right to maintain an honour once granted.[51] The privileges associated with membership in the Order of Canada are purely symbolic.

51. This privilege stands in stark contrast to the rights at issue in the cases relied on by the applicant in support of an oral hearing. Those cases involved: the right to life, liberty and security of the person[52]; the right to continue in one's employment[53]; the right to continue one's academic career[54]; and the right to financial compensation[55].

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[51] *Black, supra*, paras. 60-61, Applicant's Authorities, tab 9
[52] *Singh v. Canada (Minister of Employment and Immigration)*, [1985] 1 S.C.R. 177, Applicant's Authorities, tab 18
[53] *Khan v. University of Ottawa* (1997), 34 O.R. (3d) 535, (C.A.) ("*Khan*"), Applicant's Authorities, tab 16; *Rosann Chasin v. Canadian Broadcasting Corporation and Canadian Human Rights Commission*, [1984] 2 F.C. 209 (F.C.A.), Applicant's Authorities, tab 17
[54] *Khan, supra,* Applicant's Authorities, tab 16; *Carson v. University of Saskatchewan*, [2000] S.J. No. 500 (S.C.Q.B), Applicant's Authorities, tab 15
[55] *Patchett v. Law Society of British Columbia* (1979), 101 D.L.R. (3d) 210 (B.C.S.C.), Applicant's Authorities, tab 19

52. There is simply no legal right, liability, obligation, or other judicially cognizable interest at stake in this case. While Mr. Black asserts that harm to his reputation is an important interest that justifies a higher level of procedural fairness when removing an honour than that accorded when granting an honour, he has not shown that his reputational interest cannot be considered fairly in writing.

iv) Legitimate Expectations

53. There is no legitimate expectation that an opportunity will be granted to address the Advisory Council orally.[56] The *Constitution* does not outline any procedure for the termination of the Order of Canada. The Policy, which was developed by the Advisory Council and which is neither legislation nor a statutory instrument, outlines a procedure for the Council to follow in making its recommendations. Although the Policy sets out in great detail an eleven stage process, it does not refer to oral representations.[57] It provides that written representations will be used unless the Secretary General decides otherwise.

v) Level of Deference owed to the Decision Maker

54. The level of deference owed to both the Council and to the Governor General in the circumstances is high. The formulation of recommendations and the exercise of discretion respecting the termination of an appointment to the Order are purely subjective matters and involve merit and moral considerations.[58] The court in *Baker* indicated that deference should be accorded to decision makers in selecting their own

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[56] See *Mavi, supra*, para. 68, Respondent's Authorities, tab 5
[57] Policy, *supra*, Black Affidavit, *supra*, Exhibit 2, Application Record, tab B2
[58] *Black, supra*, para. 62, Applicant's Authorities, tab 9

procedures.[59] In all of the circumstances, the Advisory Council's decision to consider written representations prior to formulating its recommendation to the Governor General is entitled to the highest level of deference.

3) Neither the complexity of the issues nor credibility justify an oral hearing

55. Thus, even if this Court were to apply the *Baker* factors, it is clear that any requirement of procedural fairness in the circumstances is minimal, and does not include the right to an oral hearing. While the applicant attempts to conflate references to "fairness" in the Policy with a requirement to hold an oral hearing, the jurisprudence is clear that "fairness" does not require an oral hearing. Indeed, in *Baker*, the issue to be determined by the tribunal was whether Ms. Baker and her children should have been able to stay in Canada on humanitarian and compassionate grounds. Notwithstanding the potential consequences of the tribunal's decision to Ms. Baker and her family, the Supreme Court of Canada found that Ms. Baker was not entitled to an oral hearing. It cannot reasonably be suggested that Mr. Black's interest in maintaining an honorary appointment is more worthy of protection that the personal interests at stake in *Baker*.

56. The applicant's suggestion that the presence of complex and conflicting evidence requires an oral hearing in this case is also not sustainable. The Federal Court and Federal Court of Appeal have consistently rejected similar claims.

57. For instance, the Federal Court of Appeal in *Cougar Aviation Ltd. v. Canada (Minister of Public Works and Government Services)*, rejected the applicant's

[59] *Baker, supra*, para. 27, Applicant's Authorities, tab 13

allegations that denial of an oral hearing before the Canadian International Trade Tribunal was a breach of procedural fairness due to the complicated issues involved. In dismissing this ground, the Court noted that the Tribunal was entitled to conduct hearings in writing; courts should not interfere with the Tribunal's choice of procedure merely because the Court may have selected a different procedure; and "an oral hearing is not required by the duty of fairness merely because conflicting evidence on an issue may make it difficult to resolve."[60]

58. Similarly, in *Holland v. Canada*, the Federal Court found that an applicant for a firearms permit was not entitled to make oral submissions before the denial of his application.[61] The applicant, a security consultant at the Morgentaler Clinic, conceded that the statute did not require an oral hearing, but asserted that, given the serious and complex nature of the issues, one ought to have been provided. The Court rejected this assertion.

59. In *Chaplin v. Canada*, the applicant challenged a decision of the Minister of Public Safety and Emergency Preparedness to seize funds brought into Canada in excess of $10,000 contrary to the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act*. Notwithstanding Mr. Chaplin's assertion that the decision involved assessment of credibility and carried the stigma of being found in possession

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[60] *Cougar Aviation Ltd. v. Canado (Minister of Public Works ond Government Services)*, [2000] F.C.J. No. 1946, paras. 61-67, Respondent's Authorities, tab 8

[61] *Hollond v. Conodo (Attorney General)*, [2000] F.C.J. No. 1367, paras. 26-27, Respondent's Authorities, tab 10

of proceeds of crime, Justice O'Reilly rejected the assertion that Mr. Chaplin was entitled to an oral hearing.[62]

60. In *X-Wave Solutions Inc. v. Public Works and Government Services Canada*, the applicant alleged that, without an oral hearing and the benefit of cross examinations and evidence from the Department, it was unable to establish before the C.I.T.T. that the Department of National Defence had engaged in discrimination. The Federal Court of Appeal dismissed the application, noting:

> The function of procedural fairness is to set minimum standards, not to enable a reviewing court to determine how it would have exercised the Tribunal's discretion as to when to hold an oral hearing. Balancing the considerations relevant to determining whether to hold an oral hearing engages the expertise of the Tribunal, and the Court should only intervene to prevent manifest unfairness.[63]

61. Similarly, in *Boshra v. Canadian Association of Professional Employees*, the Federal Court of Appeal confirmed that the role of the court when considering whether a refusal to grant an oral hearing amount to a breach of procedural fairness is not to substitute its discretion for that of the tribunal.[64] The Federal Court of Appeal dismissed the application for judicial review notwithstanding that the procedure adopted by the tribunal did not include an oral hearing.

62. Mr. Black has not demonstrated to the Advisory Council or this Court that an oral hearing is necessary. Mr. Black has indicated that his convictions in the United

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[62] *Chaplin v. Canada*, 1012 FC 130, paras. 26-32, Respondent's Authorities, tab 11. See also : *Kennedy v. Canadian National Railway Company*, 2009 FC 438, paras. 22-24, Respondent's Authorities, tab 12

[63] *X-Wave Solutions Inc. v. Canada (Minister of Public Works and Government Services)*, 2003 FCA 301, para. 34, Respondent's Authorities, tab 9

[64] *Boshra v. Canadian Association of Professional Employees*, 2011 FCA 98, para. 15, Respondent's Authorities, tab 13

States would not stand in Canada, that he was treated unfairly in the American justice system, and that prominent individuals support his continued membership in the Order. None of these allegations makes an oral hearing necessary. Indeed, all of these issues can (and have been) addressed in writing.

63. The issues are not complex. Even if they were, oral representations are not necessary. It is often the case that complex issues are best dealt with in writing. It has been over a year since Mr. Black was first notified that termination of his honour was under consideration, and he has been provided with three separate invitations to provide written representations.[65]

64. Mr. Black has already presented to the Council a five page submission with attachments. He had the opportunity to make further written submissions as he saw fit. Mr. Black is an accomplished author who suffers no disadvantage in communicating in writing. Indeed, he has provided the Council with a copy of his book on the subject of his convictions which runs over 500 pages. He may direct the Council to any relevant portions should he wish to do so. To the extent that Mr. Black seeks to include in his submissions to the Advisory Council letters from his supporters, (such as those submitted in the course of this application), he may do so.

65. Finally, Mr. Black's contention that an oral hearing is required because issues of credibility are raised is also unsustainable. Mr. Black may be seeking an opportunity to re-litigate his conviction in the United States before the Advisory Council, in order

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[65] Black Affidavit, *supra,* Exhibits, 1, 4, 6, Application Record, tabs B1, B4, B6

to demonstrate the "legality and propriety of [his] actions".[66] It is simply not the function of the Advisory Council to reconsider the merits of Mr. Black's conviction.[67] To the extent that Mr. Black seeks to outline the differences between the Canadian and American criminal justice systems, the issue does not involve assessments of credibility, and can be considered on the basis of written representations.

66. The Advisory Council's deliberations are not an adjudicative process, involving a hearing and advocates on each side of an issue. The Council's task is to consider and make a recommendation to the Governor General as to whether termination of Mr. Black's appointment to the Order is appropriate because (a) he has been convicted of a criminal offence; or (b) his conduct "constitutes a significant departure from generally-recognized standards of public behaviour which is seen to undermine the credibility, integrity or relevance of the Order, or detracts from the original grounds on which the appointment was based."[68]

67. Mr. Black has been advised that, in making this recommendation, the Advisory Council will consider five United States decisions concerning his convictions, and any written representations Mr. Black seeks to include.[69] Should the Council be unable to resolve any concerns when it considers these matters, it can solicit additional information from Mr. Black. Mr. Black's assertion that the Council "may have

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[66] See Black Affidavit, *supra,* Exhibit 3, p. 27, Application Record, tab B3
[67] For the impropriety of impugning a criminal conviction in another forum see: *Toronto (City) v. CUPE Local 79*, [2003] 3 S.C.R. 77, para. 56, Respondent's Authorities, tab 14
[68] Policy, *supra*, Black Affidavit, *supra*, Exhibit 2, s. 3, Application Record, tab B2. See also: Black Affidavit, *supra*, Exhibits 1, 4, Application Record, tabs, B1, B4
[69] Black Affidavit, *supra*, Exhibit 4, Application Record, tab B4

questions for him" is not a basis to import a requirement for an oral hearing into any duty of fairness that may be owed in this case.

4) <u>There is no duty to give reasons in this case</u>

68. The applicant notes that no reasons were provided for the preliminary decision of the Advisory Council not to hold an oral hearing. The decision was considered, and considered again, at Mr. Black's request. Mr. Black was advised that the Advisory Council would be making its recommendation on the basis of five reported United States decisions relating to his convictions. He was invited to make written representations.

69. While certain administrative decisions may require "some form of reasons", there is no duty to provide written reasons in all administrative decisions, nor is there a duty to explain every aspect of a decision.[70] Given the minimal procedural fairness attaching to the granting or removing of honours, there can be no duty to provide reasons for a preliminary procedural decision of the Advisory Council to consider the matter in writing.

C. THE APPLICATION IS PREMATURE

70. While the legal issue raised by the applicant is wholly lacking in merit, this application should also fail because it seeks to review an interlocutory procedural decision of the Advisory Council made in the course of making its recommendation.

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[70] *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, 2011 3 SCR 708, para. 20, Respondent's Authorities, tab 15; See also: *Baker, supra*, para. 44, Applicant's Authorities, tab 13; *Alberta (Information and Privacy Commissioner v. Alberta Teachers' Association*, 2011 SCC 61, para. 54, Respondent's Authorities, tab 16; *Air Canada v. Toronto Port Authority*, 2010 FC 774, para. 104, Respondent's Authorities, tab 17

The jurisprudence is clear that interlocutory decisions of administrative bodies are not reviewable.

71. Although the rule against interlocutory judicial reviews is longstanding, the Supreme Court of Canada, the Federal Court of Appeal and the Federal Court have all recently reiterated its importance and reaffirmed the sound policy reasons for its continued application.

72. The Federal Court of Appeal has clearly stated that "appeals from interlocutory decisions should not be entertained save in exceptional circumstances".[71] As Justice Pelletier put it:

> Justice is better served if the tribunal below is allowed to complete its work (see paragraph 2 of *Prince Rupert Grain Ltd., supra*), so that appeals to this Court can proceed on the basis that all contested issues can be reviewed in one hearing on the basis of a comprehensive record".[72]

73. In the recent decision in *C.B. Powell Ltd. v. CBSA*, Justice Stratas, speaking for the Federal Court of Appeal, articulated the principle of judicial non-interference with ongoing administrative processes, and its rationale as follows:

> The normal rule is that parties can proceed to the court system only after all adequate remedial recourses in the administrative process have been exhausted. The importance of this rule in Canadian administrative law is well-demonstrated by the large number of decisions of the Supreme Court of Canada on point: ...
>
> Administrative law judgments and textbooks describe this rule in many ways: the doctrine of exhaustion, the doctrine of administrative remedies, the doctrine against fragmentation or bifurcation of

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[71] *CHC Global Operations v. Global Helicopters Pilots Association*, [2008] F.C.J. No. 1579, 2008 FCA 344 (FCA) ("*CHC Global Operations*"), para. 2, Respondent's Authorities, tab 18

[72] *CHC Global Operations, supra*, para. 3, Respondent's Authorities, tab 18

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> administrative proceedings, the rule against interlocutory judicial review and the objection against premature judicial reviews. All of these express the same concept: absent exceptional circumstances, parties cannot proceed to the court system until the administrative process has run its course. This means that, absent exceptional circumstances, those who are dissatisfied with some matter arising in the ongoing administrative process must pursue all effective remedies that are available within that process; only when the administrative process has finished or when the administrative process affords no effective remedy can they proceed to court. Put another way, absent exceptional circumstances, courts should not interfere with ongoing administrative processes until after they are completed, or until available, effective remedies are exhausted.
>
> This prevents fragmentation of the administrative process and piecemeal court proceedings, eliminates the large costs and delays associated with premature forays to court and avoids the waste associated with hearing an interlocutory judicial review when the applicant for judicial review may succeed at the end of the administrative process.[73]

74. In its decision in *Halifax (Regional Municipality) v. Nova Scotia (Human Rights Commission)* earlier this year, the Supreme Court of Canada overruled its 1971 decision and directed lower courts to no longer follow the approach set out in that case with respect to judicial intervention before an administrative process has run its course.[74] Instead, the Court approved of lower courts' restraint in this area, specifically noting the *C. B. Powell* decision and further cautioning that:

> Early judicial intervention risks depriving the reviewing court of a full record bearing on the issue; allows for judicial imposition of a "correctness" standard with respect to legal questions that, had they been decided by the tribunal, might be entitled to deference; encourages an inefficient multiplicity of proceedings in tribunals and courts; and may compromise carefully crafted, comprehensive legislative regimes.[75]

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[73] *C.B. Powell Ltd. v. Canada (Border Services Agency)*, 2010 FCA 61, leave to appeal to SCC denied, 2011 S.C.C.A. No. 267 ("*C.B. Powell Ltd.*"), paras. 30-32, Respondent's Authorities, tab 19
[74] *Halifax (Regional Municipality) v. Nova Scotia (Human Rights Commission)*, 2012 SCC 10 ("*Halifax v. Nova Scotia*"), paras. 35-38, Respondent's Authorities, tab 20
[75] *Halifax v. Nova Scotia, supra*, para. 36, Respondent's Authorities, tab 20

75. The rule is sufficiently clear that this Court routinely dismisses applications which seek to challenge interlocutory decisions.[76]

5) <u>The circumstances presented by this application are not exceptional</u>

76. Courts have narrowly interpreted the exception which would allow judicial review of an interlocutory decision. While acknowledging that "intervention may sometimes be appropriate" the Supreme Court has endorsed the restraint exercised by courts on the basis of the "sound practical and theoretical reasons" discussed above.[77]

77. While the applicant, relying on earlier case law, argues that exceptional circumstances exist where the issues involve procedural fairness or excess of jurisdiction, the recent decisions of this Court make clear that the exception is no longer so broad.

78. In the *C. B. Powell* case, Justice Stratas, having reviewed the authorities on point, concluded that courts have enforced the principle of non-intervention "vigorously" as shown by the "narrowness of the 'exceptional circumstances' exception". He noted that Courts have consistently held that concerns around "procedural fairness or bias, the presence of an important legal or constitutional issue, or the fact that all parties have consented to early recourse" do not meet the threshold necessary to warrant intervention by the Court.[78]

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[76] *Exgenoopetitj (Burnt Church) First Nation v. Canada (Human Resources and Skills Development)*, 2010 FC 1195, paras. 42-47, Respondent's Authorities, tab 21; *Lundbeck Canada Inc. v. Canada (Minister of Health)*, 2008 FC 1379, paras. 27-32, Respondent's Authorities, tab 22; *Boulos v. Canada (Attorney General)*, 2012 FC 292 ("*Boulos*"), paras. 15-25, Respondent's Authorities, tab 23

[77] *Halifax v. Nova Scotia, supra*, para. 36, Respondent's Authorities, tab 20

[78] *C.B. Powell Ltd., supra*, para. 33, Respondent's Authorities, tab 19

79. In *Garrick v. Amnesty International Canada*, the Federal Court dismissed three applications in which the Crown sought judicial review of interlocutory decisions of the Military Police Complaints Commission made during the course of an ongoing inquiry into alleged wrongdoing by Canadian Forces officers concerning Afghan detainees. The Commission had made interlocutory decisions compelling documentary production; refusing to hear a motion concerning the appropriate standard of professional conduct against which the officers' conduct should be assessed; and selecting a standard of conduct the applicants sought to challenge, rendering the second application moot. Notwithstanding the important issues raised in the remaining applications, including jurisdictional issues and potential damage to reputations, Justice DeMontigny dismissed as premature the applications for judicial review of these interlocutory decisions.[79]

80. Similarly, in *Boulos v. Canada (Attorney General),* the applicant challenged an Adjudicator's decision to consider jurisdictional issues raised by his employer based on written submissions, notwithstanding Mr. Boulos' assertion that oral evidence was necessary to afford him procedural fairness. In striking the application, Prothonotary Lafreniere acknowledged that applications should only be struck in exceptional cases, but found that the prematurity of the application was fatal. In reaching this conclusion, he noted that the application was speculative, as the adjudicator's decision could ultimately favour the applicant, or having reviewed the written representations, the

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[79] *Garrick v. Amnesty International Canada*, 2011 FC 1099, paras. 1-3, 45-55, Respondent's Authorities, tab 7

adjudicator could seek oral representations if he/she thought clarification was necessary, rendering the premature application moot.[80]

81. There is nothing in Mr. Black's application that demonstrates "exceptional circumstances". Mr. Black seeks to challenge an interlocutory decision made by the Advisory Council tasked with making a recommendation to the Governor General who ultimately exercises a Crown prerogative. Mr. Black sought an opportunity to make oral representations before the Council and was advised that no oral hearing would be held. He was invited to make written representations, and has been given several extensions of time in which to do so. The denial of an oral hearing prior to the exercise of a Crown prerogative is not an exceptional circumstance meriting judicial intervention.

82. Mr. Black, like others, should complete the administrative process before this Court entertains the application. To hold otherwise invites a bifurcated review system, whereby it would be open to Mr. Black to challenge every procedural decision of the Advisory Council that he believes may result in an unfavourable recommendation. In the event the Governor General determines that Mr. Black's appointment to the Order should be terminated, it will be open to Mr. Black to challenge any alleged procedural defects that precede the Advisory Council's determinations. However, no such determination has been made. Indeed, no recommendation has been formulated. Regardless of what that recommendation may be, this application could well be moot if

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[80] *Boulos, supra,* paras. 21-22, Respondent's Authorities, tab 23

the Governor General decides not to terminate the appointment. Accordingly, this Application should be dismissed as premature.

D. CONCLUSION

83. The Advisory Council asks this Court to dismiss this Application. Neither the Council's recommendation nor the Governor General's decision is susceptible to judicial review. Even if this were not the case, the Applicant has failed to show that he has a legitimate expectation to an oral hearing, or that the requirements of procedural fairness would justify the Court ordering the Council to grant such a request before it formulates its recommendation. Moreover, to allow judicial review at this preliminary stage will give rise to a multiplicity of processes that is entirely unwarranted given the nature of the decision at issue.

PART IV – ORDER SOUGHT

84. The Advisory Council respectfully requests that the Application be dismissed with costs.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

Dated at Toronto this 13th day of August, 2012.

Christine Mohr

Andrea Bourke

Of Counsel for the Respondent